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George M. Snellings III

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COMMENT

Louisiana Law on the Nullity of Marriage

The purpose of this Comment is to present a survey and analysis of the nullity of marriage in Louisiana. In order to realize this objective, Louisiana legislation and jurisprudence, and comparative and historical materials will be examined. As the purview of the Comment is limited to Louisiana law, conflict of laws problems will not be considered.

The Louisiana law on the subject of marriage provides the prerequisites to marriage, the forms for the celebration of marriage, which persons may marry each other, and the situations in which the consent to marry is deemed unlawful.¹ Some marriages

1. LA. CIVIL CODE art. 90 (1870): "As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the

which are attempted in violation of these laws are null but subject to ratification; others are null and not subject to ratification. Some marriages have been held to be void in spite of the fact that they were contracted in contravention of certain laws.

MARRIAGES WHICH ARE RELATIVE NULLITIES

Article 91 of the Louisiana Civil Code of 1870 provides that no marriage is valid to which the parties have not freely consented. Thus, lack of free consent begets a nullity of marriage. Articles 110 and 111,² considered in conjunction, provide that marriages to which consent has not been freely given can be attacked only by both of the parties or that one of them whose consent was not freely given, and that such marriages can be ratified by the party or parties whose consent was not freely given. It is then evident that a marriage to which consent was not voluntarily given is a null but ratifiable marriage. Traditionally, this situation has been referred to as a *relative nullity*, since it is a nullity which is subject to removal by the will of the person or persons whose consent was not freely rendered. The vices of consent which give rise to this nullity are abduction, violence, and mistake respecting the person.

Abduction

The first provision of Article 91 is that consent is not free "when given to a ravisher, unless it has been given by the party ravished, after she has been restored to the enjoyment of liberty."³ This provision apparently stems from the Canon law⁴ and was at one time a cause of nullity of marriage in French

parties, at the time of making them, were:

"1. Willing to contract;

"2. Able to contract;

"3. Did contract pursuant to the forms and solemnities prescribed by law."

The provisions pertaining to willingness and ability to contract marriage and the forms and solemnities of the ceremony are set forth in Titles IV and V, Book I, Louisiana Civil Code, and in Title 9 of the Louisiana Revised Statutes.

2. LA. CIVIL CODE art. 110 (1870): "Marriages celebrated without the free consent of the married persons, or of one of them, can only be annulled upon application of both the parties, or of that one of them whose consent was not free.

"When there has been a mistake in the person, the party laboring under the mistake can alone impeach the marriage."

Id. art. 111: "In the cases embraced by the preceding article, the application to obtain a sentence annulling the marriage, is inadmissible, if the married persons have, freely and without constraint, cohabited together after recovering their liberty or discovering the mistake."

3. *Id.* art. 91(1).

4. The latest statement is to be found in CODEX JURIS CANONICI, Canon 1074, § 1 of which provides: "Between the abductor and the woman who has been abduct-

law.⁵ It is an anachronism today, having originally been special legislation in keeping with what seems to have been one of the problems of its time. It was apparently intended to provide for a situation in which an unmarried female, perhaps even by her own desire, was carried away from her family against their wishes. Even assuming that such a person freely consented to her abduction and subsequent marriage, it would seem that her marriage would be null because of her having been taken away from her family and not returned.⁶ Thus, the word "ravisher" seems to mean "abductor."⁷ There are no cases involving this provision in the jurisprudence.

Violence

The second vice of consent in Article 91 is that of consent extorted by violence. The jurisprudence has been to the effect that this violence need not be physical in nature, but it may be the threat of physical violence.⁸ It has also been held that in order to obtain an annulment on this ground, the person acting under the influence of fear produced by the threat must reasonably believe that the person making it is able to carry it out⁹ and must clearly show that his will was destroyed by his fear.¹⁰ It would appear that a mere showing of the violence or the threat thereof and a subsequent consent would not be sufficient without the clear establishment of a causal nexus between the two. In addition, since the basis of the action is the fact that the consent was coerced, the person who is responsible for the violence or threat thereof should be immaterial.¹¹ Finally, if the

ed with a view to marriage, there can be no marriage as long as she remains in his power."

5. See 1 PLANIOL, CIVIL LAW TREATISE (a translation by the Louisiana State Law Institute), no. 1059 (1959); 1 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL n° 431 (14th ed. 1926); PROJET DU GOUVERNEMENT, art. 5 (1800), the text of which is found following LA. CIVIL CODE art. 91 (1870), in LOUISIANA LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA (1940).

6. For a discussion of abduction, see BOUSCAREN & ELLIS, CANON LAW 530 (3d ed. 1957).

7. CODEX JURIS CANONICI, Canon 1074. The pertinent part of this Canon is virtually the same as Paragraph 1 of Article 91 and uses the word "abductor." See note 4 *supra*.

8. Quealy v. Waldron, 126 La. 258, 52 So. 479 (1910). Cf. 1 PLANIOL, CIVIL LAW TREATISE (a translation by the Louisiana State Law Institute), no. 1058 (1959), in which this commentator states that "violence is any physical or moral constraint which prevents consent from being free."

9. Cf. Quealy v. Waldron, 126 La. 258, 52 So. 479 (1910).

10. Pray v. Pray, 128 La. 1037, 55 So. 666 (1911). The court stressed the importance of freedom of the will, but emphasized the point that the court will not allow the dissolution of marriage unless the proof that the consent was not voluntary is conclusive.

11. This is the rule under ordinary contract law, and it would seem equally

threat relates to someone who is a member of the immediate family of the person whose consent is induced by it, the consent should be held to be vitiated upon proof that, but for the threat, it would not have been forthcoming.¹²

It could be argued that in any case where the consent is procured by a threat of any nature, it should be considered unlawful. However, the Louisiana Supreme Court, in the case of *Pray v. Pray*,¹³ held that where the husband had married the wife under the threat of imprisonment for his seduction of her before the marriage, no annulment would be granted as, in the court's opinion, the threat was justifiable. It would seem that the court, in this case, allowed the mere forms of the law to be used in a coercive manner. It is to be noted that the court in a later case did allow an annulment where a threat of imprisonment was induced by the girl's fraudulent misrepresentations as to what had transpired between herself and the man in question.¹⁴ Thus, the court did recognize that there are some limits as to what may be done to force one person to marry another by threat of legal prosecution. Nevertheless, it would seem that the consent, if unfree, is no less so because it resulted from the threat of prosecution rather than the threat of violence. This being so, the marriage to which one consented as the result of such a threat should be a relative nullity.

Mistake Respecting the Person

The last provision of Article 91 relates to the imperfection of consent derived from a mistake respecting the person with whom one contracted marriage. This provision stems from the French law.¹⁵ Although the earlier French commentators differed as to whether mistake respecting the person included the qualities of the person as well as the physical identity,¹⁶ the more

applicable here. LA. CIVIL CODE art. 1852 (1870) provides: "A contract, produced by violence or threats, is void, although the party, in whose favor the contract is made, did not exercise the violence or make the threats, and although he were ignorant of them."

12. Cf. *id.* art. 1853, which provides: "Violence or threats are causes of nullity, not only where they are exercised on the contracting party, but also when the wife, the husband, the descendants or ascendants of the party are the object of them."

13. 128 La. 1037, 55 So. 666 (1911). See also *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836 (1895).

14. *Grundmeyer v. Sander*, 175 La. 189, 143 So. 45 (1932).

15. CODE CIVIL art. 180. Cf. 1 PLANIOL, CIVIL LAW TREATISE (a translation by the Louisiana State Law Institute), no. 1061 (1959).

16. Mistake as to the person was considered to mean only a mistake as to the person's physical identity before the drafting of the Code Napoléon with the exception of a marriage to which one of the parties had consented believing the other, who was in fact a slave, to be a free person. 6 POTHIER, OEUVRES no 311 (2d ed.

recent French commentaries appear to exclude the former from the vices of consent.¹⁷ Louisiana's position seems consistent with that of the more modern French authorities, the interpretation of the last provision of Article 91 having been most restricted. This writer can find no Louisiana cases in which an annulment was allowed where the petition alleged a mistake respecting the person. However, in the well-known case of *Delpit v. Young*,¹⁸ the Louisiana Supreme Court held that the husband's error as to his wife's chastity prior to marriage was not such a "mistake respecting the person" as to constitute a ground for nullity. The court stated by way of dictum that only a mistake as to physical identity was embraced by Article 91. In a later decision, the court held that the wife's lack of knowledge as to her husband's insanity at the time of marriage would not vitiate her consent.¹⁹ The opinion in this case approved the dictum in the *Delpit* case, and thus it would seem clear that the mistake must be as to the physical identity of the person one is marrying to give rise to a cause of action for mistake respecting the person. It is, however, interesting to note that the French will allow divorce in some cases of mistake as to the physical qualities of the person,²⁰ and this allowance seems to compensate somewhat for the fact that annulment will not be granted even where there is a serious error as to some quality of the person.

Ratification of a Relatively Null Marriage

The removal of a relative nullity may be made at will by the person whose consent was originally imperfect. Article 111 of the Louisiana Civil Code only provides for tacit ratification, by "cohabitation."²¹ Although there are no civil cases in Louisiana which have interpreted this word, a criminal case construed it to mean sexual intercourse.²² It is not clear what extent of "co-

1861). However, during the Commission discussions on the drafting of the projet of the Code Napoléon, Bonaparte himself, the then First Consul, insisted that a mistake as to a person's qualities should constitute a ground for annulment. 1 MARCADE, *EXPLICATION DU CODE NAPOLEON* no 637 (5th ed. 1859). Some early commentators asserted the correctness of this inclusion. 1 MARCADE, *op. cit. supra*, at no 638; 2 DURANTON, *COURS DE DROIT FRANÇAIS* no 64 (3d ed. 1834).

17. 7 AUBRY ET RAU, *DROIT CIVIL THÉORIQUE FRANÇAIS* no 462, nn. 6-8 (6th ed. 1948); BAUDRY-LACANTINERIE ET HOUQUES-FOURCADE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL — DES PERSONNES* 2, no 1737 (2d ed. 1900).

18. 51 La. Ann. 923, 25 So. 547 (1899).

19. *Stier v. Price*, 214 La. 394, 37 So.2d 847 (1948).

20. See 1 PLANIOL, *CIVIL LAW TREATISE* (a translation by the Louisiana State Law Institute), no. 1163 *et seq.* (1959).

21. See note 2 *supra*.

22. *State v. Freddy*, 117 La. 121, 41 So. 436 (1906) (involving incest); see *State v. Brown*, 236 La. 562, 108 So.2d 233 (1959), noted in 19 LOUISIANA LAW REVIEW 700 (1959).

habitation" would be required for the presumption of ratification to arise in Louisiana. The French Civil Code requires voluntary cohabitation for six months for this presumption to arise,²³ but it is submitted that such a requirement is arbitrary and unnecessary. The Louisiana Supreme Court has held that a failure to protest the marriage when ample time had elapsed after the fear of violence had ceased amounted to a ratification of the marriage.²⁴ It seems that the court should attempt to conclude what was truly the intention of the parties on the basis of all types of external manifestations.

Prescription and Proof

The questions of whether the action of nullity of marriage prescribes, and if it does what is the prescriptive period, appear unsettled.²⁵ It is possible that the period is five years, following the rule of Article 3542 of the Code²⁶ which applies generally to the prescription of actions in nullity. However, it is suggested that, as the state takes a greater interest in marriage than mere contracts of the ordinary nature,²⁷ and as there is actually no specific prescriptive period provided for the action of nullity of marriage, it would be better to follow the general rule that "husbands and wives cannot prescribe against each other."²⁸

In the area of proof, the case of *Duvigneaud v. Loquet*²⁹ seems especially noteworthy. This was a nullity action brought by the heirs of the husband who contended that the wife's consent had been forced. The Louisiana Supreme Court refused to grant the annulment on the ground that the marriage act, signed by the husband, indicated that his wife had given free, verbal consent. In this case, the result reached was manifestly correct since Article 110 provides that only the parties or one of them may bring the action in an instance of relative nullity. However, it seems that the marriage act should not have been treated as con-

23. CODE CIVIL art. 181.

24. *Boutterie v. Demarest*, 126 La. 278, 52 So. 492 (1910). *Cf. Thompson v. Thompson*, 148 La. 499, 87 So. 250 (1921).

25. It is asserted by Baudry-Lacantinerie that the action of nullity of marriage does prescribe, but this commentator seems uncertain as to what is the period of prescription. 1 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL n° 595 (14th ed. 1926).

26. LA. CIVIL CODE art. 3542 (1870). This article provides that an action to nullify or rescind "contracts, testaments or other acts" is prescribed by five years.

27. *Stallings v. Stallings*, 177 La. 488, 148 So. 687 (1933); *Hurry v. Hurry*, 144 La. 877, 81 So. 378 (1919).

28. LA. CIVIL CODE art. 3523 (1870).

29. 131 La. 568, 59 So. 992 (1912).

clusive on its face as the consent was given in the presence of the husband and surely could have been given under duress.

THE NATURE OF THE RELATIVE NULLITY OF MARRIAGE

It has been seen that a relative nullity is that which attaches to marriages as the result of an imperfection of consent. The law seeks to protect persons from being bound unwillingly. Therefore, a means of relief in the form of an action in nullity is provided for a person whose consent is deemed unlawful. As this provision is in the interest of the individual concerned, he is allowed to waive his right to bring the action by ratifying his marriage.³⁰ It is this factor which makes the nullity relative in nature.

The application of the concept of relative nullity succeeds in that it protects the individuals within its ambit without creating the hardship which would result were their marriages not subject to ratification by them. However, difficulty lies in the fact that it has been held that such marriages produce all ordinary civil effects until or unless there is a judicial decree declaring them null.³¹ This would seem to be a proper conclusion on immediate reflection. However, second thought leads to the inevitable question of what the court will hold in a case involving a relatively null marriage which was not declared null and was not ratified because the opportunity to do either never presented itself. An example of this situation is the case where the force which induced the marriage continued until the death of the person upon whom it operated. It would seem that his wife and any children conceived during this forced union would reap the material results of his lifetime by operation of law. It is submitted that such a solution might be inequitable, depending upon the facts of the particular case.³² Certainly, marriages to which consent has for some reason not been freely given are ratifiable, but perhaps they should not be treated as valid in all cases simply because an action has not been brought to have their nullity declared. To treat them as valid where there was no opportunity to take action would seem anomalous, considering that the purpose of the concept of relative nullity is to protect the interests

30. LA. CIVIL CODE art. 111 (1870). *Cf.* note 2 *supra*.

31. Succession of Barth, 178 La. 847, 152 So. 543 (1934); Succession of Loyacano, 135 La. 945, 66 So. 307 (1914).

32. For instance, one spouse might be forced to have sexual intercourse with the other after the marriage. It would certainly seem unjust to let a child born as the result of such intercourse inherit the patrimony of his father.

of persons who have not freely consented to marry. Furthermore, such a solution might be prejudicial to the equities of the other heirs of the unconsenting party. It is suggested that a better solution would be to permit the other heirs to contest the validity of the marriage within a limited time after their discovery of the material facts.³³ In this way, the purpose of the relative nature of the nullity would be fulfilled without substantially impairing the rights of persons who would otherwise have an interest in the unconsenting party's estate.

MARRIAGES WHICH ARE ABSOLUTE NULLITIES

Certain prohibitions which, if violated, render a marriage null and non-ratifiable concern bigamy, consanguinity, miscegenation, adultery and possibly insufficient age and relationship by adoption. From Article 113 of the Code³⁴ it appears that such marriages are not ratifiable, as this article provides that they are subject to attack even by the state. Also, since these marriages are prohibited and as there are no provisions for the ratification of such marriages, the legislative intention seems to have been that the parties to such marriages should not be able to ratify them. As these null marriages may not be ratified, the nullity has been termed an *absolute nullity*.³⁵

Bigamy

Article 93 of the Louisiana Civil Code provides that persons *legally* married are incapable of contracting another marriage until the one in existence is dissolved. Early support for the proposition that the marriage contracted in contravention of this provision is absolutely null is found in a Louisiana Supreme Court decision of 1860³⁶ which held that a bigamous marriage is an absolute nullity which is not subject to ratification in any

33. A similar result is obtained under LA. CIVIL CODE arts. 113, 114 (1870) (which apply to absolutely null marriages).

34. *Id.* art. 113, as amended by La. Acts 1938, No. 426; La. Acts 1950, No. 242. This article provides in part: "Every marriage contracted under the other incapacities or nullities enumerated in the second chapter of this title may be impeached either by the married person [persons] themselves, or by any person interested, or by the Attorney General."

35. Inasmuch as the parties to marriages which are absolutely null are not in any sense lawfully married, the question of how these parties may conduct themselves with regard to contracting a second, legal, marriage naturally arises. This problem will be treated of under the section entitled "The Nature of the Absolute Nullity of Marriage," page 576 *infra*.

36. *Summerlin v. Livingstone*, 15 La. Ann. 519 (1860). Accord, *Prieto v. Succession of Prieto*, 165 La. 710, 115 So. 911 (1928); *State v. Donzi*, 133 La. 925, 63 So. 405 (1913).

way. The provision and the judicial interpretation accorded it seem patently unequivocal.

Consanguinity

The second instance of absolute nullity in Louisiana is an incestuous marriage, as prohibited by Article 94 of the Code. This article prohibits the marriage of persons related to one another in the direct ascending or descending line. It further provides that this prohibition extends also to "children born out of marriage." It does not provide that the marriage must be between persons within certain generations with respect to each other; so it must include all generations in the direct line. The writer found no actions of nullity for this cause in the jurisprudence, and, as the provision is quite clear, no further comment seems necessary.

Since its amendment by Act 120 of 1900, Article 95 of the Code³⁷ has prohibited marriage between brother and sister, uncle and niece, aunt and nephew, and first cousins. This provision employs the qualifying clause, "whether of the whole or the half blood," to indicate that marriages between *brother and sister* related to each other in this way are forbidden. Although the extension provided by this clause was applied to uncle and niece by a Louisiana court in a criminal trial for incest,³⁸ there appears to be no legislative basis for this application of Article 95 as it then read or in the criminal statute which was in force at that time.³⁹ However, the rule of this case has since been incorporated into Louisiana's present Criminal Code.⁴⁰

From time to time, Article 113 of the Louisiana Civil Code has been amended⁴¹ to ratify all marriages of Louisiana domiciliaries related within the prohibited collateral degree of consanguinity which were in existence at the time of its passage and which had been contracted in a jurisdiction in which they were permissible. These amendments have not repealed the absolute impediment to marriage provided for by Article 95, but have

37. LA. CIVIL CODE art. 95 (1870), as amended by La. Acts 1900, No. 120; La. Acts 1902, No. 9.

38. *State v. Gupton*, 51 La. Ann. 155, 24 So. 784 (1898).

39. La. Acts 1884, No. 78; LA. CRIM. STATS. §§ 1136, 1137 (Dart 1932), which provided that persons who were forbidden to marry under LA. CIVIL CODE arts. 94, 95 (1870) were guilty of the crime of incest if they did in fact contract marriage.

40. LA. R.S. 14:78 (1950).

41. La. Acts 1938, No. 426; La. Acts 1950, No. 242.

served to reduce its gravamen by virtue of the comparatively small number of years which have separated them.⁴²

In France, persons who are related to each other by reason of *affinity* are prohibited from marrying.⁴³ Louisiana has specifically abolished any impediment arising out of such a relationship,⁴⁴ although such a provision might be advisable for the policy purpose of encouraging stability within the family structure.

Attention should be given to the case of a marriage between persons related by adoption, either in the direct or collateral line. The only legislation which seems pertinent to this matter is Article 214 of the Code, as amended by Act 514 of 1958, which provides that an adopted person "is considered for all purposes as the legitimate child . . . of the adoptive parent or parents." Thus, Article 214 could be interpreted to prohibit marriages between persons related by adoption in the instances in which they would be forbidden to marry if related by consanguinity. It would seem that this interpretation should be accorded it, for such a construction lends to the stability of marriages which might otherwise be threatened by the presence of an adopted child.

Miscegenation

Article 94 of the Code provides another situation of absolute nullity, viz., the miscegenetic marriage of a "white person" and a "person of color." Although such a marriage was permissible between 1870 and 1894,⁴⁵ it has otherwise been prohibited in Louisiana since 1807. What degree of colored blood is necessary to establish that one is a "person of color" is not certain, but a Louisiana Supreme Court decision of 1910⁴⁶ held that one-sixteenth *traceable* Negro blood was sufficient to make the marriage of the person possessing it and a white person miscegenetic, and a decision of 1938⁴⁷ seems to emphasize traceability only.

42. See La. Acts 1914, No. 151; La. Acts 1930, No. 54; La. Acts 1938, No. 426. Cf. note 41 *supra*.

43. CODE CIVIL art. 161. See also KELLY, THE FRENCH LAW OF MARRIAGE 4 (1895).

44. LA. CIVIL CODE art. 96 (1870): "All other impediments on account of relationship or affinity are abolished."

45. For legislative history, see LA. CIVIL CODE art. 8 (1808); LA. CIVIL CODE art. 95 (1825); LA. CIVIL CODE art. 94 (1870), as amended by La. Acts 1894, No. 54.

46. Lee v. New Orleans Great Northern R.R., 125 La. 236, 51 So. 182 (1910).

47. Sunseri v. Cassagne, 191 La. 209, 185 So. 1 (1938), *aff'd* on rehearing, 195

Moreover, in 1942 the Louisiana legislature rejected the definition of one-eighth Negro blood which the projet of the Criminal Code of that year suggested in defining the crime of miscegenation.⁴⁸ Hence it would seem that the quality of traceability may be the only requisite.

Louisiana Revised Statute 9:201, originally Act 220 of 1920, treats the miscegenetic union of an Indian and a person of the "colored and black" race as null and void.⁴⁹ There have been no cases concerning the marriage forbidden by this legislation, but it is supposed that such a marriage would be treated in the same way as the miscegenetic marriage prohibited by Article 94 of the Civil Code. As all impediments which were not enumerated when the Louisiana Civil Code of 1870 was enacted as a body of law by Act 97 of that year were abolished,⁵⁰ it seems that valid marriages could be contracted by persons of racial combinations other than Caucasoid-Negroid and Indian-Negroid.

It is interesting to note that the question of the constitutionality of anti-miscegenation laws is currently being raised in other jurisdictions. The California Supreme Court has held the California anti-miscegenation statutes⁵¹ unconstitutional on the grounds that they were discriminatory in light of the Fourteenth Amendment to the United States Constitution and not designed to meet a clear and present danger.⁵² It was only four years prior to this decision that the Federal Circuit Court of Appeals for the Tenth Circuit held that a similar Oklahoma statute was a valid and acceptable policy law falling within the category of laws "deemed to be promotive of the welfare of society as well as individual members thereof."⁵³ A more recent case than either of these is *Naim v. Naim*,⁵⁴ an action instituted in Virginia to annul the marriage of a white person and a Chinese. The highest court of Virginia upheld the constitutionality of that state's anti-

La. 19, 196 So. 7 (1940).

48. PROJET OF A CRIMINAL CODE FOR THE STATE OF LOUISIANA art. 80 (Louisiana State Law Institute, 2d draft, 1941).

49. See OPINIONS ATTORNEY GENERAL 587 (1932-34), in which it is stated that marriages between white persons and Indians are not prohibited in Louisiana.

50. LA. CIVIL CODE art. 115 (1870). Cf. LA. CIVIL CODE art. 116 (1825).

51. CALIF. CIVIL CODE §§ 60, 69 (1872).

52. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948). For a collection of cases holding criminal miscegenation statutes constitutional, see *The Work of the Louisiana Supreme Court for the 1958-1959 Term — Constitutional Law*, 20 LOUISIANA LAW REVIEW 277, 280, n. 8 (1960).

53. *Stevens v. United States*, 146 F.2d 120, 123 (10th Cir. 1944).

54. 197 Va. 80, 87 S.E.2d 749 (1955), vacated, 350 U.S. 891 (1955), adhered to, 197 Va. 734, 90 S.E.2d 849 (1956), motion denied, 350 U.S. 985 (1956).

miscegenation statute⁵⁵ on the ground that the Tenth Amendment to the Federal Constitution vested in it, as a state of the union, the power to adopt such reasonable measures as it might deem necessary to suppress that which it regards as a public evil. Although this decision was appealed to the United States Supreme Court, that court did not pronounce judgment on the merits of the case.⁵⁶ Thus, the *Naim* case is not conclusive of the federal constitutional issue, and it is possible that Louisiana's present provisions concerning miscegenetic marriages may sometime in the future be put to the test of constitutionality.

Adulterer and Accomplice

Article 161 of the Civil Code⁵⁷ provides that an adulterer cannot contract matrimony with his accomplice in adultery without incurring the penalties of being considered a bigamist and prosecuted as such and having the marriage regarded as a nullity. Under the jurisprudence, for this provision to be applicable, the adultery must have been the grounds for the dissolution of the former marriage,⁵⁸ and, in addition, the accomplice must be identifiable from the record in the divorce proceeding.⁵⁹ It seems that there is no legislative basis for these requirements, and it is submitted that they only serve to weaken what would otherwise be a very creditable law.

The instance of nullity provided for in Article 161 certainly seems desirable for the protection of the marital state, as it indirectly discourages acts of infidelity. However, in 1958 the Louisiana legislature ratified all marriages contracted in contravention of Article 161 prior to that time.⁶⁰ It is submitted that what-

55. VA. CODE § 20-54 (1950).

56. On appeal, the United States Supreme Court ordered the action remanded to the Virginia circuit court in which it had originated to get additional evidence into the record, but the Virginia Supreme Court of Appeals refused to remand it, saying that there had been ample evidence to adjudicate the matter. *Cf.* note 54 *supra*.

57. LA. CIVIL CODE art. 161 (1870), as amended by La. Acts 1958, No. 340: "In case of divorce, on account of adultery, the guilty party can never hereafter contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage; provided, however, that marriages heretofore contracted in contravention of this article but which are not invalid under any other laws of this state shall be deemed valid."

58. Succession of Hernandez, 46 La. Ann. 962, 15 So. 461 (1894).

59. Rhodes v. Miller, 189 La. 288, 179 So. 430 (1938); Succession of Knapfer, 174 La. 1048, 142 So. 609 (1932). *Contra*, Succession of Gabisso, 119 La. 704, 44 So. 438 (1907).

60. La. Acts 1958, No. 340. It is of interest to note that the legislature did not even provide that the marriage must have been contracted out of this state in a jurisdiction which would recognize the validity of such marriages, as it did in

ever good might come of such an amendment is outweighed by the meritorious expression of policy originally enacted by the legislature and the value of consistency in its maintenance.

Age

Article 92 of the Civil Code prohibits celebrants from officiating at marriage ceremonies wherein the parties desiring to marry are under the ages of eighteen, males, or sixteen, females, unless, for grave cause, judicial permission for the marriage is obtained.⁶¹ Although Article 113 would seem to make the prohibition of this article a cause of absolute nullity,⁶² its language and sanctions are directed to the celebrant and not the parties themselves. Consequently, the Louisiana Supreme Court has recently ruled, in cases involving females under sixteen years of age, that this provision would not render their marriages null.⁶³ It is then certain that a failure to meet the requirement of Article 92 will not effect a nullity, but the question of how far this is to be extended remains unanswered. Surely there should be some age below which persons may not contract marriage. For example, England has long provided that there are certain minimum ages which persons must attain before being able to contract valid marriages. At one time, this minimum age was seven years, with the provision that the marriage would be null only so long as either of the parties had not reached the age at which the marriage could be consummated, meaning so long as either was not capable of sexual intercourse.⁶⁴ Then, for a long while, the English courts followed the older canonical requirement of the ages of fourteen, males, and twelve, females.⁶⁵ The present English statutory requirement is sixteen for both parties.⁶⁶ It

amending Article 113 to ratify marriages of persons related within the prohibited collateral degree.

61. LA. CIVIL CODE art. 92 (1870), as amended by La. Acts 1934, No. 140, § 1; La. Acts 1956, No. 289, § 1. Before the amendment by La. Acts 1934, No. 140, § 1, the ages were 14, males, and 12, females.

62. This would seem to be so for the reason that Article 92 is in the second chapter of Title IV, Book I, which fits it within the scope of Article 113.

63. *In re* State in Interest of Goodwin, 214 La. 1062, 39 So.2d 731 (1949), in which the female was fourteen; *State v. Golden*, 210 La. 347, 26 So.2d 837 (1946), in which the female was fifteen. Cf. LA. CIVIL CODE art. 112 (1870).

64. JACKSON, *THE FORMATION AND ANNULMENT OF MARRIAGE* 19 (1951).

65. The minimum ages under the Canon law are now sixteen, males; fourteen, females. CODEX JURIS CANONICI, Canon 1067. The fact that the English courts followed the Canon law requirement for many years is understandable in light of the fact that, by statute (20 & 21 VICT. c. 85, § 22 (1857), re-enacted by Supreme Court of Judicature Act (1925), 15 & 16 GEO. 5, c. 49, § 32 (1925)), those who administer the common law are required to do so where possible.

66. Age of Marriage Act of 1929, 19 & 20 GEO. 5, c. 36. See also Marriage Act

is suggested that marriages in which either person is under the age of legal puberty (fourteen, males; twelve, females) as provided by Article 36 of the Civil Code⁶⁷ should be considered null.⁶⁸ This position is supported by Article 34 of the Code which provides, in part: "as nature does not always impart the same maturity and strength of judgment at the same age, the law determines the period at which persons are sufficiently advanced in life to be capable of contracting marriage."

THE NATURE OF THE ABSOLUTE NULLITY OF MARRIAGE

Under Article 113 of the Civil Code, absolutely null marriages are subject to attack by the parties themselves, by the state, or by any "person interested." The basis for this would seem to be that such marriages are considered incompatible with the best interests of society. Probably this is the reason for there being no code provision allowing voluntary ratification of these marriages. Thus, the nullity is not subject to removal by the will of the parties and is absolute in nature.

The first question is who is to be classed as an *interested* person. The Code expressly provides that a bigamous marriage may be attacked by the spouse of the first marriage to whose prejudice the second was contracted.⁶⁹ Article 114, which relates to all situations of absolute nullity, provides that collateral relations and children born of a previous marriage may *not* bring the action until they have an actual pecuniary interest. It is possible that, on the basis of the somewhat nebulous wording of this provision, any other party having a pecuniary interest, even a future one, may institute the action.⁷⁰ Although there is no legislation to this effect, it is submitted that, as absolute nullities of marriage were apparently established in the interest of society, anyone having any sort of interest should be able to attack them. Although the French generally require a pecuniary interest, they have granted the right to bring the action to ascendants on the

of 1949, 12 & 13 GEO. 6, c. 76, § 2, and p. 1680, the 5th schedule for the extent of the repeal of the Age of Marriage Act of 1929.

67. LA. CIVIL CODE art. 36 (1870). *Cf. id.* art. 34.

68. The question of what type of nullity should be present in marriages of a person or persons under the suggested minimum ages is treated of in the section entitled "Some Problems of Major Importance," page 580 *infra*.

69. LA. CIVIL CODE art. 116 (1870), as amended by La. Acts 1906, No. 150.

70. *Cf.* CODE CIVIL art. 184 (Cachard's transl. rev. ed. 1930): "Any marriage contracted in violation of the provisions contained in articles 144, 147, 161, 162, and 163, can be attacked either by the husband and wife themselves or by all the interested parties, or by the Public Prosecutor."

basis of their family interest.⁷¹ It is this kind of interest which should entitle persons not having a pecuniary concern to attack absolutely null marriages.

Another problem relates to the status of persons who have contracted marriages which are absolute nullities. It has been held consistently that the assertion of rights based on the absolute nullity of a marriage need not be preceded by a declaration of nullity, or that the marriage may be impeached indirectly, and even that a second marriage will not be null merely because a previously attempted absolutely null marriage had not been so declared by a judicial decree.⁷² Thus, the absolutely null marriage is a nonentity, the status of the parties to them remaining unaltered by the ceremony. Although this is true, it would seem that third persons may, and at times should, refuse to consider the marriage a nullity until it is so declared. For instance, a marriage license issuing officer should not accept the statements of applicants that their former marriages were nonexistent in the eyes of the law. Also, the failure to obtain a declaration of nullity might result in the validity of subsequent marriages being challenged on the ground of bigamy. Thus, the question arises as to the necessity *vel non* of bringing the action of nullity even though the marriage is absolutely null. The purpose to be served by attaining a formal judicial declaration of nullity would be to protect the parties concerned, and it is submitted that this outweighs the possible difficulties of expense and the time involved in seeking the decree.

A final topic of interest in this section is the putative marriage doctrine.⁷³ In strict theory absolutely null marriages produce no civil effects. However, in the interest of innocent persons, the putative marriage doctrine has been established to modify the harsh results which would otherwise attend such null-

71. 1 PLANIOL, CIVIL LAW TREATISE (a translation by the Louisiana State Law Institute), no. 1038 (1959).

72. *Gaines v. Relf*, 53 U.S. 472 (1851) (in which the United States Supreme Court held that the bigamous marriage of Louisiana domiciliaries was absolutely null and that no action need be brought to declare it so); *Coon v. Monroe Scrap Material Co.*, 191 So. 607 (La. App. 1939) (in which the court held that the marriage of the plaintiff and the deceased was not void where the deceased had a living wife from whom he was not divorced at the time he married the plaintiff, and the evidence proved that the first wife had a living husband from whom she was not divorced at the time she contracted marriage with the deceased); *Succession of Minvielle*, 15 La. Ann. 342 (1860) (miscegenetic marriage); 2 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* no 265 (1926), in which the same is said of incestuous marriages.

73. See Comment, 1 LOYOLA L. REV. 54 (1941), for a discussion of the putative marriage doctrine in Louisiana.

ities. Actually, the situation of the so-called putative marriage is beyond the scope of this Comment, but mention of it cannot properly be excluded. Basically, the doctrine imputes to certain null marriages the civil effects of a lawful marriage. Where both of the parties to the marriage contracted in good faith,⁷⁴ not realizing that there existed in one or both of them the legal inability to contract, the marriage is held to produce all the civil effects of a valid marriage until knowledge of the impediment is acquired.⁷⁵ These effects extend to the children of the marriage as well.⁷⁶ Where only one of the parties was in good faith, the marriage produces civil effects only in his favor and in favor of any children born of the marriage.⁷⁷ It is interesting to note that the Louisiana Supreme Court has even extended the benefits under this doctrine to a good faith situation where there was no marriage ceremony.⁷⁸ Such a holding is consonant with the view that an absolutely null marriage is legally no marriage at all.

DIRECTORY PROVISIONS

Article 97 of the Code provides that minors who have attained the competent age to marry must have the consent of their parents or tutors and furnish proof of this consent to the licensing officer, but from Article 112 it is clear that a failure to obtain this consent will not affect the validity of the marriage. The only sanction against the minors is possible disinheritance,⁷⁹ and that against the license issuing officer and celebrant seems rather inadequate.⁸⁰

Article 137 provides that no female may contract another

74. *Funderburk v. Funderburk*, 214 La. 717, 38 So.2d 502 (1949); *Eason v. Alexander Shipyards*, 47 So.2d 114 (La. App. 1950). In these cases, good faith was held to cease at such time as the innocent party or parties to the marriage acquire certain knowledge of the nullity which attaches thereto.

75. LA. CIVIL CODE art. 117 (1870); *McCaffrey v. Benson*, 40 La. Ann. 10, 3 So. 393 (1888); *Sittler v. Grimes*, 3 Orl. App. 363 (La. App. 1906). See also *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248 (1891), in which the court held these effects to be without restriction.

76. LA. CIVIL CODE art. 117 (1870).

77. *Id.* art. 118; *Succession of Buisserie*, 41 La. Ann. 217, 5 So. 668 (1889); *Succession of Rapides*, 7 Orl. App. 141 (La. App. 1910).

78. *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1935), in which the court stated that it was not the actual fact of marriage which was important, but rather the reasonable belief on the part of one or both of the parties that they had validly contracted marriage.

79. LA. CIVIL CODE art. 112 (1870): "The marriage of minors, contracted without the consent of the father and mother, can not for that cause be annulled, if it is otherwise contracted with the formalities prescribed by law; but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper."

80. See LA. R.S. 9:207 (1950), which provides for a fine of not more than \$25.00.

marriage within the first ten months following the dissolution of a previous marriage. This article seems to have been designed to protect the parties immediately concerned with reference to the problem of paternity should a child be born within that interim. The Louisiana Supreme Court has held, where a marriage was contracted in contravention of Article 137, that no nullity resulted.⁸¹ The court based its holding partly on the fact that this problem had been provided for by Article 960.⁸² It is suggested that an examination of the provision on which the court relied in arriving at this conclusion reveals that it falls far short of meeting the possible situations in which the paternity problem might arise. This point aside, the present judicial interpretation seems to be that Article 137 is merely directory to women in the circumstances it describes,⁸³ and this interpretation is bolstered by the fact that Article 137 does not fall, in its position in the Code, within the express scope of Article 113.

All persons desiring to contract marriage in Louisiana are required to obtain a medical certificate showing them to be free from venereal disease.⁸⁴ This legislation is directed to license issuing officers, and, in its original form, contained a penalty provision which pertained only to officers who issued licenses to persons who had not presented the required certificate. Although no cases have construed this article, in the light of the construction which has been accorded other such provisions,⁸⁵ it is submitted that a failure to obtain a medical certificate would not lead to a nullity of marriage.

It is to be remembered that the third and final requisite for a lawful marriage under Article 90 of the Civil Code is that the parties did contract "pursuant to the forms and solemnities prescribed by law." These requirements of form and ceremony seem to be: a marriage license⁸⁶ directed to the celebrant authorizing

81. Succession of Benton, 106 La. 494, 31 So. 123 (1901).

82. LA. CIVIL CODE art. 960 (1870), the article on which the court relied in disposing of the issue of the paternity problem, provides: "If the mother marry again within two months after the death of her husband, and a child is born five months after the second marriage, if the child be born capable of living, it is considered the issue of the first marriage, and is admitted to the succession of the first husband."

83. See *State v. Stevenson*, 115 La. 777, 40 So. 44 (1906); Succession of Benton, 106 La. 494, 31 So. 123 (1901). See also *OPINIONS ATTORNEY GENERAL* 3, 573 (1938-40).

84. LA. R.S. 9:241 (1950), as amended by La. Acts 1958, No. 160, § 1.

85. See note 92 *infra*.

86. Cf. LA. CIVIL CODE art. 99 (1870), as amended by La. Acts 1948, No. 312 and La. Acts 1882, No. 25; LA. CIVIL CODE art. 100 (1870).

him to celebrate the particular marriage;⁸⁷ a seventy-two hour waiting period to be observed between the issuance of the license and the actual celebration;⁸⁸ a person authorized by law to celebrate marriages;⁸⁹ three competent witnesses;⁹⁰ and a marriage act to be signed by the witnesses, celebrant, and parties to the marriage at the conclusion of its celebration.⁹¹ Several of the ceremonial requirements have been held to be merely directory, and the court has therefore held marriages to be valid although one of them was lacking.⁹² It is likely that if more than one of them were lacking the court would not hold a marriage to be null. However, marriages by consent and cohabitation, "common law" marriages, are not recognized in Louisiana.⁹³ Therefore, the Louisiana Supreme Court has held that a union which was brought about by a ceremony purporting to be a marriage but lacking all of the legal ingredients was not a legal marriage.⁹⁴ The remaining question is one of where the line is to be drawn, that is, how many and which of the requirements must be met for the marriage to be valid.

SOME PROBLEMS OF MAJOR IMPORTANCE

The problem of what has been referred to as "simulated consent"⁹⁵ has not been treated in Louisiana legislation. Such a consent is given by a person whose primary motivation is not matrimony. Convenience, jest, monetary gain, social face-saving, and the acquisition of citizenship status are examples of such motivations. Following the theory of cause in conventional obliga-

87. *Id.* art. 104.

88. LA. R.S. 9:203 (1950); LA. CIVIL CODE art. 99 (1870), which also provides that this waiting period may be dispensed with by the celebrant when, in his opinion, there is serious or grave reason for performing the marriage sooner. *Cf.* LA. R.S. 9:204 (1950), which provides that the waiting period may be dispensed with upon certification by certain judges in situations in which, in their opinions, meritorious reasons exist for the dispensation.

89. LA. CIVIL CODE art. 99 *et seq.* (1870); LA. R.S. 9:202 (1950).

90. LA. CIVIL CODE art. 105 (1870).

91. *Ibid.*

92. *Duvigneaud v. Loquet*, 131 La. 568, 59 So. 992 (1912) (failure to sign marriage act); *Landry v. Bellanger*, 120 La. 962, 45 So. 956 (1908) (failure to have marriage act signed by three witnesses); *Sabalot v. Populus*, 31 La. Ann. 854 (1879) (failure to obtain marriage license); *Russell v. Tagliavore*, 153 So. 44 (La. App. 1934) (failure to have marriage act signed by three witnesses).

93. *Blasini v. Succession of Blasini*, 30 La. Ann. 1388, 1398 (1878). *Accord*, *Succession of Gaines*, 227 La. 318, 79 So.2d 322 (1955); *Succession of Anderson*, 176 La. 66, 145 So. 270 (1932); *Marzette v. Cronk*, 141 La. 437, 75 So. 107 (1917).

94. *Sesostrius Youchican v. Texas & P. Ry.*, 147 La. 1080, 86 So. 551 (1920). In this case a ceremony was performed by an Indian chief, according to tribal ritual, and the parties to it apparently deemed themselves married.

95. See *SHEED, NULLITY OF MARRIAGE* 84-87 (1959).

tions,⁹⁶ only the person who consented as the result of error induced by the party whose consent was simulated could be heard to attack the validity of the marriage. The French, who refer to this situation generally as being one of fraud even though in many instances simple error would be all that was involved, have not included it as a vice of consent. Apparently, they have avoided it because of a fear that litigation would flood the courts were it included.⁹⁷ The Canon law has long treated such a consent as imperfect and the resulting marriage as a relative nullity.⁹⁸ Of course, the Canon law follows the presumption of validity of marriages where external consent was manifested, but this presumption may be overcome by sufficient proof.⁹⁹ It is suggested that the Louisiana courts should grant an annulment upon a proper showing of simulated consent, since there is, in such cases, no meeting of the minds as to the principal cause of the marriage contract.

Another problem is presented where one of the parties to the marriage was insane or intoxicated at the time of the ceremony. While there are no provisions on this specific matter in our legislation, there are code articles providing that the contracts of interdicted persons are null for lack of legal consent.¹⁰⁰ This is also true of the contracts of persons who are "notoriously" insane although not interdicted.¹⁰¹ Finally, this nullity has been extended by the jurisprudence to the contracts of an intoxicated person.¹⁰² It is true that the foregoing relates to ordinary contracts, but it would seem that there is little reason why the courts should not grant the annulment of marriages entered into with these disabilities. Although no reported Louisiana cases have been brought to annul marriages because of the intoxicated condition of one of the parties, there have been such suits to which an insane person was a party, but the annulment was not allowed.¹⁰³ This has probably been due in large measure to the confusion which has commonly surrounded this problem as to

96. See Smith, *A Refresher Course in Cause*, 12 LOUISIANA LAW REVIEW 2 (1951), for a discussion of cause in Louisiana.

97. See 1 PLANIOL, CIVIL LAW TREATISE (a translation by the Louisiana State Law Institute), no. 1057 (1959).

98. CODEX JURIS CANONICI, Canon 1086.

99. See BOUSCAREN & ELLIS, CANON LAW 551 (3d ed. 1957). Cf. CODEX JURIS CANONICI, Canon 1086.

100. LA. CIVIL CODE arts. 401, 1779, 1784, 1788 (1870).

101. *Id.* art. 1778. See *Fecel v. Guinault*, 32 La. Ann. 91 (1880); *Holland v. Miller*, 12 La. Ann. 624 (1857).

102. *Emerson v. Shirley*, 188 La. 196, 175 So. 909 (1937).

103. *Stier v. Price*, 214 La. 394, 37 So.2d 847 (1948); *Ryals v. Ryals*, 130 La. 244, 57 So. 904 (1912).

whether such a marriage would be relatively null from an imperfection of consent or absolutely null from an inability to contract on the part of the insane person.¹⁰⁴ The courts seem to have given this problem the construction of unfree consent,¹⁰⁵ rather than incapacity to contract. It is submitted that such marriages should be absolutely null for such time as the insanity or intoxication exists and relatively null thereafter. This conception has its reasons. First, the consent of the person is not unfree; it is legally absent or lacking. Therefore, an absolute nullity should attach to the marriage as the person lacked contractual capacity. By recognizing the absolute character of the nullity, the estate of the insane or intoxicated person would be protected should he die before regaining contractual capacity.¹⁰⁶ Next, the marriage should become relatively null upon the intoxicated or insane person's attaining full and natural control of his mental facilities, because he then would have regained his legal capacity to contract. Finally, by allowing such a marriage to be ratifiable, it would not be necessary for the parties to repeat the ceremony if they desired to remain married.

The last consideration of this section is that of the inability to contract marriage resulting from insufficient age, which has been discussed, to a certain extent, in an earlier section of the Comment.¹⁰⁷ It was suggested by this writer that the marriages of persons below the ages of legal puberty should be null. There is still the question of what would be the nature of the nullity. It is submitted that such marriages should be absolutely null until such time as the person or persons of insufficient age attain the minimum age requirement. Thus, prior to this time, the marriage would be subject to attack by any of the persons listed in Article

104. *Stier v. Price*, 214 La. 394, 37 So.2d 847 (1948), in which the court ruled that the plaintiff wife could not sue to have her marriage to the allegedly insane defendant annulled on the basis that only the person whose consent was not free may sue for annulment. *Of. dictum* in *Vincent v. Ledoux*, 146 La. 144, 159, 83 So. 439, 444 (1919). See also *Sabalot v. Populus*, 31 La. Ann. 854 (1879), in which the court held that where the formerly insane spouse continues to cohabit with his partner in the marriage after sanity has been restored the marriage would be ratified.

105. See note 104 *supra*.

106. An example of one way in which his patrimony would be protected is that a bad faith spouse would be excluded from his succession if the marriage were an absolute nullity. The converse would be true if it were a relative nullity, for under the existing jurisprudence he would have been the only one who could have been heard to attack the marriage. For that reason, if he died before bringing an action to annul the marriage, the marriage would be valid and not subject to attack. See discussion under the section entitled "The Nature of the Relative Nullity of Marriage," page 569 *supra*.

107. See discussion under subsection on age in section entitled "Marriages Which Are Absolute Nullities," page 570 *supra*.

113 of the Code. However, upon attaining the minimum ages, it is suggested that the nullity should become relative in nature and therefore subject to removal by the parties to the marriage. In this way, the concept of absolute nullity in situations of contractual incapacity would be maintained, and yet the parties would be permitted to ratify their marriage upon attaining the requisite legal capacity.

SUMMARY

It has been seen that there are two distinct situations of nullity of marriage in Louisiana law. One of these is the relative nullity situation which is derived from an imperfection of consent. The other situation is that of absolute nullity which results from an inability to contract marriage in one or both of the parties. The nature of both these situations of nullity has been explored in an effort to understand the full import of the concepts. It has also been seen that there are ceremonial requirements for marriage which, if not complied with, may or may not serve to invalidate the marriage, depending upon the individual circumstances. Finally, certain problems which were considered of sufficient importance were examined. It would seem that certain areas of the law on annulment of marriage in Louisiana are fairly clear, but in other areas problems still exist. Some possible solutions to these problems have been suggested in the hope that perhaps those who encounter them will understand more fully their nature and be better able to cope with them.

George M. Snellings III